Supreme Court, U.S.
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No. 91-1906

In The

Supreme Court of the United States

October Term, 1991

FERRELLGAS INC.,

Petitioner,

v.

CURTIS S. ASHWAY,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MARIGENE ABBOTT DESSAINT
Counsel of Record
JACK DANIEL KLAUSNER
BURCH & CRACCHIOLO, P.A.
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
(602) 234-9927
Attorneys for Respondent

Date: June 26, 1992

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OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Did the Ninth Circuit err in reversing summary judgment on Respondent-employee's state law claim for breach of an employment agreement, where the Petitioner-employer has admitted that cause was required to terminate employment and the court found that a genuine issue of material fact is in dispute as to the existence of cause for termination?

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FERRELLGAS INC.,

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CURTIS S. ASHWAY,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

Respondent Curtis S. Ashway hereby asks the Court to deny the Petition for a Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals. The Ninth Circuit Court has correctly applied Arizona law to this diversity action on the issue of breach of contract, where the defendant employer has admitted below that the employment agreement requires cause for termination.

OPINIONS BELOW

Petitioner has omitted the Ninth Circuit's order filed September 12, 1991, which amended its order of August 7, 1991. The court's September 12, 1991, order deleted Section III of its Memorandum Decision of May 14, 1991. (App. A). The Ninth Circuit's decision in this action is therefore found in its Memorandum Decision affirming summary judgment entered May 14, 1991; its order dated August 7, 1991, reversing summary judgment in part, affirming in part, and remanding for trial; and its order dated September 12, 1991, amending the August 7, 1991, order. (Reprinted sequentially at App. A).

RESPONDENT'S STATEMENT OF THE CASE

Respondent Curtis Ashway was employed from October 1985 to December 1, 1986, by Buckeye Gas Products Company, the predecessor in interest to Petitioner Ferrellgas Inc. ("Ferrellgas"). At the time of his termination, Ashway was the district manager at the company's Phoenix district office. Sharon Tye, a secretary in the adjoining Phoenix division office, made allegations to the company that Ashway had sexually harassed her. The company terminated Ashway's employment without giving him an opportunity to refute the allegations, in disregard of Ashway's denial and despite a total lack of corroboration of the allegations.

A crucial fact, omitted from the Ferrellgas Petition, is that Ferrellgas has admitted, for purposes of summary judgment and the appellate court proceedings, that its employment agreement with Ashway requires cause to

terminate employment. The company's termination policy, published to employees, includes the following provision:

> *Buckeye Gas Policy B-14 "Employment Termination" Policy*
>
> 14.101 It is the policy of Buckeye Gas Products to effect employment termination in a manner that ensures just and equitable treatment for the employee and the company.

(App. B). The record reflects that the company's custom and practice was to terminate employees for cause. The only "cause" for Ashway's termination was the bare allegation of Sharon Tye that he had harassed her.[1]

Ashway filed a complaint in state court in November 1987 for wrongful termination, negligence, breach of the employment agreement, and defamation. After Ferrellgas

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[1] The "facts" set forth in Ferrellgas' Statement of Facts in Support of Defendants' Motion for Summary Judgment (appended to Ferrellgas' Petition) are misleading. The statement contains extraneous facts not relevant to the decision to terminate Ashway, while at the same time it omits numerous facts critical to the issues and supported by deposition testimony and affidavits in the record. This conflicting evidence, when taken in the light most favorable to the party opposing summary judgment, reveals that genuine issues of material fact are in dispute. Plaintiff's Statement of Facts in Opposition to Summary Judgment and Ashway's Opening Brief to the Ninth Circuit set forth those disputed facts in detail. However, this Court's denial of the Petition may be rendered on the legal issues without consideration of the disputed factual issues.

removed the action to federal court on the basis of diversity, the district court granted defendant summary judgment on plaintiff's complaint. Following Ashway's appeal and subsequent petition for rehearing, the Ninth Circuit reversed summary judgment on Ashway's claim that his termination was in breach of his employment agreement. The court found that Ashway had raised a genuine issue of material fact as to the existence of cause for his termination. (App. A, order of August 7, 1991). Summary judgment was affirmed on Ashway's claims for negligence and wrongful termination in violation of public policy. The court denied Ferrellgas' petition for rehearing and rejected its suggestion for rehearing en banc. (App. A, order of March 2, 1992).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The judgment of the court of appeals was correct. Contrary to the claims of Petitioner, this decision does not conflict with any decision of other courts of appeal. The manner in which Petitioner has framed its question misleadingly implies that the court has applied Arizona law to impose a higher "cause in fact" standard for termination than imposed by Title VII's "good faith" standard. In truth, cause for termination is required by the Petitioner's own policies, not Arizona law. Arizona law was applied by the Ninth Circuit only to the extent that where good cause is required for termination, an employer's good faith belief is insufficient, and whether cause actually

existed is a question of fact which must be decided by the jury.

This case, therefore, presents solely a question of state law as to whether Ashway raised a genuine issue of material fact in dispute so as to preclude summary judgment on his breach of contract claim. Ferrellgas claims, in essence, that because there was an allegation of sexual harassment, it need not prove that it had cause in fact to terminate Ashway. Ferrellgas urges the court to grant it a "privilege" for its termination decision based on Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(e) *et seq.* Ferrellgas argues that this Court should find that Title VII preempts state contract law. If Ferrellgas were correct, every employer would have a federal "privilege" to breach its employment agreements and terminate employees with impunity, whenever there was any allegation of sexual harassment.

Ashway, on the other hand, has argued consistently in the courts below that the employer's Title VII duty to investigate allegations of sexual harassment runs to the accused as well as to the accuser. The requirements of fair dealing with employees and thorough investigation into accusations do not vanish at the mention of the words "sexual harassment." To grant the employer immunity from judicial scrutiny as a matter of law whenever the employer claims a "good faith belief" for termination would negate every employee policy provision requiring cause for termination. The result would be increased discrimination and unfair treatment in the workplace.

II. THE NINTH CIRCUIT HAS CORRECTLY APPLIED ARIZONA LAW TO THE FACTS OF THIS CASE

The Arizona courts have limited an employer's right of discharge, based on the employment contract. *Wagenseller v. Scottsdale Memorial Hosp.*, 147 Ariz. 370, 710 P.2d 1025 (1985). Arizona recognizes an implied-in-fact contract term as an exception to the at-will employment rule. *Leikvold v. Valley View Community Hosp.*, 141 Ariz. 544, 688 P.2d 170 (1984). Where an employer issues a policy statement and by its language or actions encourages reliance on it, the employer cannot be free to selectively abide by it. Having announced a policy, the employer may not treat it as illusory. *Id.* at 548, 688 P.2d at 174. In this case, the employment agreement was modified by Buckeye Gas Policy B-14, which assures employees fair and equitable treatment in termination decisions. (App. B).

Jeski v. American Express Co., 147 Ariz. 19, 708 P.2d 110 (Az. App. 1985) is directly on point. Jeski denied the allegation that he had sent obscene materials to a management employee, but was given no opportunity to refute the allegation and was promptly fired. *Id.* The Arizona appellate court reversed summary judgment, holding that the employee manual purported to make assurances of fair treatment, personal respect, and job security, and those broad terms could be reasonably construed in more than one sense. *Id.* at 22, 708 P.2d at 113. The jury should be given the task of deciding if the personnel manual modified the employment at-will relationship and whether the employer breached the employment contract. *Id.*

Ferrellgas has admitted, for purposes of summary judgment, that the employment agreement between Ashway and Ferrellgas required cause for termination. Ferrellgas argues, however, that the jury should not be permitted to determine whether it breached its agreement to treat employees fairly and terminate only for cause when Title VII is involved. Instead, Ferrellgas claims that the lesser standard of an employer's "good faith belief" that cause existed should be sufficient.

The law in Arizona, as well as in many states, is that an employer's good faith belief that cause existed for termination is insufficient, and whether cause actually existed is a question of fact. *E.g., Davis v. Tucson Arizona Boys Choir Soc'y*, 137 Ariz. 228, 232, 669 P.2d 1005, 1009 (Az. App. 1983); *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 261 Cal. Rptr. 185 (1989). Whether the employer breached the employment agreement is a question of material fact for the jury. *Jeski* at 22, 708 P.2d at 113. The court cannot decide, as a matter of law, that Ashway was treated fairly where he denied the allegations, there was no corroborating evidence, and he was given no meaningful opportunity to defend himself. Here, Ferrellgas conducted its "investigation" of the Phoenix office by telephone from Tulsa, Oklahoma, but omitted talking to employees in the small office who would have been in a position to have seen or heard the incidents if they had taken place. Where only three male supervisors were contacted in the employer's investigation and all denied any knowledge of sexual harassment, and the only female contacted was not working in the same office and had no actual knowledge of sexual

harassment, a reasonable jury could believe there was no cause to terminate Ashway's employment.

The Ninth Circuit's decision, which reversed summary judgment on Ashway's breach of contract claim, adheres to the reasoning of *Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990), *cert denied*, 111 S. Ct. 2014 (1991). *Sanders* was decided under Alaska law, which is consistent with Arizona law on this issue. In *Sanders*, the plaintiffs were employees on an oil drilling rig who were terminated based on allegations that they had used marijuana aboard the oil rigs. Although the employees denied the allegations, the company fired them in the interests of safety and the need for enforcement of strict discipline aboard the rigs. *Id.* at 193. Their employment agreement, however, required good cause to terminate and the employees argued that the employer must prove that it had good cause to fire, not merely a reasonable but erroneous belief that it had cause. *Id.* at 194.

The *Sanders* court held that if an employer claims that the employee was discharged for specific misconduct, and the employee denies the charge, the question of whether the misconduct occurred is one of fact for the jury. *Id.* at 194-95. Citing to *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 261 Cal. Rptr. 185 (1989), the *Sanders* court agreed that an employer's good faith belief that it possessed good cause does not dispose of a wrongfully discharged employee's claim for breach of contract. *Id.* The court said, "The war on drugs can be waged without turning our back on the rightful function of

juries in resolving factual disputes." *Id.* at 195. Judge Reinhardt, in his concurring opinion, stated as follows:

> Were the dissent to prevail, the focus in employment law in this country would be drastically altered: the focus would no longer be on whatever violation of company policy actually occurred; it would shift entirely to an examination of the employer's subjective state of mind. The job protection that employees have successfully bargained for since the days of Franklin Delano Roosevelt and the New Deal would disappear, to be replaced by the posing, in all potential discharge cases, of a single, radically different question: Was a supervisor's erroneous belief that an employee violated company policy held in good faith? The actual facts of the case would become insignificant – only the employer's mental state would matter.
>
> * * *
>
> It is simply *not* enough for an employer to show that he was well intentioned, that his heart was pure or that *if* the employee *had* committed an improper act he would be free to discharge him. It is not enough that the employer had a *mistaken* belief that an employee violated some rule or that it had cause for that mistaken belief.

Id. at 196; 197. (Emphasis in original). In the Ashway case, the accusations of sexual harassment are identical from a policy standpoint to the allegations of drug use in *Sanders*. Similarly, the state and federal policy against sexual harassment can be waged without eliminating the rightful function of juries. As a practical matter, an employer, when challenged, would always claim that it had a good faith belief that there was cause to fire. If the inquiry ends on that bare assertion, employees who have

been promised fair and equitable treatment and termination for cause would be arbitrarily and routinely deprived of the benefit of their employment agreements.

III. CERTIORARI IS NOT APPROPRIATE BECAUSE THIS DECISION IS NOT IN CONFLICT WITH THE DECISIONS OF THE OTHER CIRCUITS

Petitioner Ferrellgas misleadingly and erroneously claims that the Ninth Circuit decision here is in conflict with decisions from the Fifth and Eighth Circuits. Ferrellgas cites to two appeals court cases, both of which are inapposite to the facts of this case: *Garziano v. E.I. DuPont de Nemours & Co.*, 818 F.2d 380 (5th Cir. 1987); and *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703 (8th Cir. 1984). The decisions, properly understood, are not in conflict.

A. There is no conflict with Garziano, a defamation suit decided under Mississippi defamation law.

In *Garziano*, a terminated employee brought an action against his former employer for libel and slander based on the company's publication of a bulletin to its employees following his termination. The bulletin included information about sexual harassment in general, and referred to the "recent sexual harassment incident which resulted in an employee's termination." *Garziano* at 384. The employer contended that communication to its employees was protected by a qualified privilege as a

matter of law.[2] The Fifth Circuit found that Mississippi recognizes a qualified privilege as a shield against defamation claims as a matter of public policy. *Id.* at 385. The court found that the district court erred by not instructing the jury properly on the issue of qualified privilege, but remanded the case for a further determination by the jury as to whether the employer abused the privilege due to excessive publication. *Id.* at 391-392, 394.

Garziano was a case decided on the basis of state defamation law, after a jury trial, and without any discussion of a privilege based on Title VII. *Garziano* establishes no precedent for Ashway's breach of contract claim, which was decided at the summary judgment stage. Nevertheless, Ferrellgas argues that a privilege similar to that found in the law of defamation should be established in situations where an employer is investigating claims of sexual harassment. As discussed in *Garziano* and numerous cases, qualified and absolute privilege are well-established defenses in the defamation and First Amendment area. However, there is no precedent for grafting the defamation privilege onto Ashway's breach of contract claim. Certainly if Congress had intended Title VII to grant a special immunity to employers, it would have provided for it by statute.[3] However, Title VII does

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[2] Similarly, *Stockley v. AT&T Info. Sys., Inc.*, 687 F. Supp. 764 (E.D.N.Y. 1988) was a defamation suit where the issue was whether statements made by the employer during its investigation should be accorded a qualified privilege.

[3] *Feldleit v. Long Island R.R.*, 723 F. Supp. 892 (E.D. N.Y. 1989), cited by Ferrellgas, is an example of Congress' ability to preempt state law claims. In *Feldleit*, the district court found

(Continued on following page)

not grant employers a privilege to cause injury to their employees, nor does it require an employer to breach its employment agreement to treat its employees fairly and equitably. Public policy is not furthered by granting employers special immunity to harm their employees.

B. There is no conflict with Crimm, where the question was whether the sexual harassment accusation was a pretext for unlawful age discrimination.

The second case relied upon by Petitioner, *Crimm v. Missouri Pac. R.R.*, 750 F.2d 703 (8th Cir. 1984), was, again, an appeal from a jury verdict. The plaintiff sought damages under the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621. The plaintiff alleged that he was forced to resign because of his age, while the employer claimed that he was terminated because he had sexually harassed a subordinate. *Id.* at 706. Although the plaintiff denied the harassment accusation, there was one witness to at least one incident. *Id.* The issue in *Crimm* was whether the employer had introduced sufficient evidence

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that the plaintiff's contract claim was preempted by the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"). The district court recognized that the RLA preempts what is known as "minor disputes," and provides a unique dispute resolution framework which severely circumscribes the role of the courts where there is a collective bargaining agreement. *Id.* at 895-96, 899. There are no similar provisions in Title VII which would provide a remedy to a person falsely accused of sexual harassment.

that the plaintiff was discharged for a legitimate, non-discriminatory reason, or whether the employer's alleged "good faith belief" that sexual harassment had occurred was a mere pretext for a discriminatory firing. *Id.* at 712-13. The focus of the inquiry was explained as follows:

> The employer, however, "need not persuade the [trier of fact] that the proffered reason in fact justified the discharge because the *issue is not whether the reason articulated by the employer warranted discharge but whether the employer acted for a nondiscriminatory reason.*"

Id. at 713. (Emphasis added).

The *Crimm* decision is inapplicable to the facts of this case where there is no question of pretext or discrimination against Ashway. The relevant issues addressed by the Ninth Circuit in the Ashway case were as follows:

> I. Where the employer admits that an employee may be terminated for cause only, is the employer's determination that good cause existed conclusive as a matter of law, barring inquiry by a jury?
>
> II. Where the company's policy manual promises "fair and equitable treatment in employment termination," can the court conclude as a matter of law that the agreement was not breached where an accused employee is terminated on the basis of an uncorroborated accusation of sexual harassment which the employee has denied?

(Ashway's Opening Brief, Statement of Issues, p. 1).

Crimm has in fact been relied upon by the New Mexico Supreme Court in a case that is factually very similar to Ashway. *Kestenbaum v. Pennzoil Co.*, 108 N.M. 20, 766 P.2d 280 (1988), involved a former employee's claim that the company had violated his employment agreement by terminating him unfairly and without just cause based on an allegation of sexual harassment. 766 P.2d at 282. Following a jury trial, the plaintiff was awarded damages for breach of the employment contract. *Id.* at 281. The state supreme court upheld the verdict, noting that it would be erroneous to instruct the jury that it "could find good cause from the employer's subjective good faith belief as opposed to an objective standard of reasonable belief." *Id.* at 288. In the Ashway case, as in *Kestenbaum*, *Crimm* and *Garziano*, the issue should be decided by the jury.

The circuit courts, applying the laws of the various states, are not in conflict with the Ninth Circuit decision to reverse the grant of summary judgment and to remand this case for trial on the issue of whether Ashway was terminated without cause in violation of his employment agreement.

IV. THIS COURT SHOULD DENY REVIEW BECAUSE TITLE VII DOES NOT PREEMPT AN EMPLOYEE'S STATE LAW CAUSES OF ACTION

As Petitioner Ferrellgas concedes, the law does not require an employer to terminate an employee because of charges of sexual harassment. *Barrett v. Omaha Nat'l Bank*, 726 F.2d 424, 427 (8th Cir. 1984). However, Ferrellgas makes the astonishing argument that Title VII's good

faith belief standard should preempt a "state law requirement of cause in fact" to avoid liability for wrongful discharge. (Petition, pp. 25-27). As a threshold consideration, Respondent again repeats that it is not Arizona law which requires cause in fact to discharge, but rather Ferrellgas' own established policies. Arizona law provides, however, that where cause is required for discharge, the employer's good faith belief that cause existed for termination is insufficient, and whether cause actually existed, is a question of fact for the jury. *Davis v. Tucson Arizona Boys Choir Soc'y*, 137 Ariz. 228, 232, 669 P.2d 1005, 1009 (Az. App. 1983).

The Ferrellgas preemption argument is legally frivolous. The very language used by Congress clearly demonstrates that Title VII is not intended to preempt state law remedies:

> Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. § 2000 h-4. As recognized by the Ninth Circuit in *Bernstein v. Aetna Life & Casualty*, 843 F.2d 359, 364 (9th Cir. 1988), "It is well established that Title VII does not preempt common law remedies." *Id.* at 364-65 and cases cited therein. This is in accord with the clear holding of the Arizona Supreme Court that Title VII does not preempt state common law causes of action. *Id.* at 365, citing

to *Ford v. Revlon, Inc.*, 153 Ariz. 38, 44, 734 P.2d 580, 586 (1987).

Contrary to Ferrellgas' dire predictions, there is no "collision with an act of Congress" in this case. This is merely a diversity action decided on the basis of state contract law and summary judgment principles. Ashway was terminated in December 1986. Due to an erroneous grant of summary judgment which has been correctly reversed by the Ninth Circuit, Ashway has yet to receive his day in court on his state law claim for breach of his employment agreement. Further delay of resolution on the merits should not be condoned.

V. CONCLUSION

The Petition for Writ of Certiorari to review the judgment of the Ninth Circuit Court of Appeals should be denied. The court correctly held that summary judgment should be reversed where there is a genuine issue of material fact in dispute as to the existence of cause for Ashway's termination. Under Arizona law, where cause is required to terminate employment, an employer's "good faith belief" that cause existed is insufficient, and whether cause actually existed is a question of fact for the jury. This decision was properly rendered on the basis of state law, and warrants no further review.

RESPECTFULLY SUBMITTED this 26th day of June, 1992.

MARIGENE ABBOTT DESSAINT
Counsel of Record
JACK DANIEL KLAUSNER
BURCH & CRACCHIOLO, P.A.
702 East Osborn Road, Suite 200
Phoenix, Arizona 85014
(602) 234-9927
Attorneys for Respondent

APPENDIX A

EXHIBIT A-1

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS S. ASHWAY, Plaintiff-Appellant, vs. FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V, Defendant-Appellee.	No. 90-15008 D.C. No. CV-88-1806-PHX-CA MEMORANDUM* (Filed May 14, 1991)

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, District Judge, Presiding

Argued and Submitted April 11, 1991
San Francisco, California

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Plaintiff-appellant Curtis S. Ashway brought an action against defendant-appellee Ferrellgas[1] ("the company") for terminating his employment for allegedly sexually harassing co-worker Sharon Tye. The district court granted summary judgment in favor of the company after finding the company adequately investigated the sexual harassment allegations before firing Ashway. We affirm.

I

Ashway filed a complaint in state court for breach of his employment agreement, wrongful termination in violation of public policy, negligence in failing to properly investigate the sexual harassment allegations, and defamation. The company removed the action to federal district court. On April 20, 1989, the district court granted summary judgment for the company on all the counts. On December 4, 1989, the district court denied Ashway's motion for new trial or amendment of judgment and entered judgment for the company.

In granting summary judgment in favor of the company, the district court concluded that one common issue governed each of Ashway's causes of action: whether the company breached a duty to Ashway to adequately investigate the sexual harassment allegations before terminating him. The court found that the company met its duty, and that its investigation was adequate as a matter of law.

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[1] Ferrellgas is the successor in interest to defendant/appellee Buckeye Gas Products Company, the entity that originally hired Ashway.

On appeal, Ashway essentially argues that the district court improperly granted summary judgment for two reasons. First, Ashway maintains the company's investigation was inadequate. Second, Ashway contends that, under Arizona law, the company's good faith belief that it had cause to fire him is not enough, and that the company had to have actual cause before terminating him. According to Ashway, material issues of fact remain in dispute regarding both issues.

II

On the question of the adequacy of the investigation, we agree with the district court that the company's investigation was adequate as a matter of law. The company supported its summary judgment motion with documents, affidavits, and deposition testimony documenting its investigation. Personnel Director William Cahill described in his affidavit the steps he took to investigate Tye's complaint. Cahill stated he discussed Tye's allegations and Ashway's behavior at length with Tye, who seemed very sincere. Tye also provided Cahill with a written statement. Cahill then discussed Tye's complaint over the phone with Division Operations Manager John Jonescu, who had found Tye crying one night after a particular disturbing encounter with Ashway; with Robert Hetzler, Jonescu's supervisor; and with Ashway's supervisor and Tye's boss, Gilbert Johnson. Each of the men indicated Tye in no way provoked the conduct.

Cahill also discovered that Hetzler's secretary, Susan Richardson, had knowledge regarding the allegations.

Cahill asked her to submit a written statement. Richardson's statement indicated that Tye told Richardson that Ashway had entered her office when she was alone, stood in front of her desk, fondled his genitals, said he was the biggest and best in town and told her angrily, "if she didn't want him, she didn't know what she was missing." Richardson also stated former employee Tammy Cooper told Richardson that Ashway routinely describe his sexual activities to her (Cooper) in detail. The company tried to locate Cooper but was unsuccessful.

Cahill stated he also discussed the matter with the company's area vice president and with corporate counsel, who advised Cahill to terminate Ashway. Based on that advice and the belief by Cahill, Hetzler and Hundley that Tye's allegations were true, the company instructed Hetzler to terminate Ashway unless Ashway did something to make Hetzler believe the allegations were false. On December 1, 1986, Johnson and Hetzler met with Ashway and gave him a copy of Tye's statement. Although Ashway appeared to be amused by the allegations, after some prodding he ultimately denied them. Hetzler determined Ashway was lying, and gave Ashway an hour to submit his resignation or be terminated. When Ashway refused to resign, he was terminated.

Ashway argues that certain deposition testimony by Jonescu, Johnson, Hetzler, and Richardson suggests that the company did not conduct the investigation in the manner described by Cahill. An examination of this testimony, however, reveals merely that the witnesses did not recall all their specific conversations with Cahill regarding Tye's complaint, and that they did not have personal

knowledge of Ashway's harassing behavior. The testimony does not raise a genuine issue of material fact as to the adequacy of the investigation, or as to Cahill's credibility in describing the investigation.

Finally, as the district court pointed out, the fact that the company's investigation "may have been less extensive than the discovery involved in this case" does not mean the company did not adequately investigate Tye's allegations. Because Tye maintained that no other employees were present when the harassment occurred, the company's failure to interview Tye's other co-workers cannot be considered negligent.

We conclude that the company's investigation of Tye's complaint, which included interviews with Tye and four of her coworkers, written verification from Tye and Richardson, and a meeting with Ashway, was adequate as a matter of law. *See Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984) (investigation of sexual harassment charges deemed adequate where employer interviewed complainant, alleged harassers, and two potential witness co-workers).

III

We next turn to Ashway's contention that he was terminated without cause in violation of his employment agreement. The company conceded for the purposes of summary judgment and this appeal that Ashway's employment agreement requires cause for termination, but maintains the district court correctly found that cause existed as a matter of law. Ashway argues summary judgment was improperly granted on this issue because,

under Arizona law, an employer must have actual cause for termination, and an employer's good faith belief that cause for termination exists is not enough.

No Arizona court has yet addressed this issue directly. Nevertheless, Ashway argues that two Arizona Court of Appeals cases, *Davis v. Tucson Arizona Boys Choir Society*, 137 Ariz. 228, 669 P.2d 1005 (Ct. App. 1983), and *Jeski v. American Express Co.*, 147 Ariz. 19, 708 P.2d 110 (Ct. App. 1985), suggest that the Arizona Supreme Court would hold that an employer must show it had actual cause to terminate an employee, rather than a mere good faith belief it had cause.

The company maintains Ashway's reliance on *Davis* and *Jeski* is misplaced, and that *Loffa v. Intel Corp.*, 153 Ariz. 539, 738 P.2d 1146 (Ct. App. 1987), established that an employer's good faith determination that cause for termination exists is sufficient absent evidence of bad faith or pretext. The company also argues that, given federal and state laws prohibiting sexual harassment, *see* 42 U.S.C. §§ 200e, *et seq.* (Title VII); Ariz. Rev. Stat. § 41-1461, *et seq.*, along with the requirement that employers investigate and eradicate sexual harassment in the workplace, *see Ford v. Revlon, Inc.*, 153 Ariz. 38, 734 P.2d 580 (1987) (en banc), it is unlikely the Arizona Supreme Court would require an employer, who terminates an employee it believes in good faith has been sexually harassing a co-worker, to prove that the sexual harassment actually occurred.

Although the Arizona Supreme Court has not yet spoken on this issue, courts in other jurisdictions have recently held that, where an employment contract

requires cause for termination, the employer must show that cause actually existed. *See Sanders v. Parker Drilling Co.*, 911 F.2d 191 (9th Cir. 1990) (interpreting Alaska law); *Wilkerson v. Wells Fargo Bank*, 212 Cal. App. 3d 1217, 261 Ca. Rptr. 185 (1989). Other courts, however, have held that an employer's good faith determination that it has cause to terminate an employee is sufficient, and that the employer's decision to terminate an employee for cause should not be second-guessed by a jury. *See Simpson v. Western Graphics Corp*, 293 Or. 96, 643 P.2d 1276 (Sup. Ct. Or. 1982) (holding that employer's good faith determination that cause existed was sufficient and that grounds for cause need not have actually occurred); *Frazier v. Minnesota Mining and Manufac.*, 82 Or. App. 328, 728 P.2d 87, 88 (Or. App. 1986) (holding question of what constitutes cause was for employer to decide, although factual issues remained in dispute as to whether discharge was pretextual or in bad faith), *review denied*, 303 Or. 74, 734 P.2d 354 (1987).

In light of Arizona's strong public policy against sexual harassment – particulary [sic], the Arizona Supreme court's ruling in *Ford* that employers who fail to investigate and remedy sexual harassment may be held liable for damages to the injured employee – we believe the Arizona Supreme Court might well hesitate before allowing a jury to second guess an employer's good faith determination that sexual harassment has occurred. *See Sanders*, 911 F.2d at 204-18 (Kozinski, J., dissenting) (discussing the negative consequences of requiring an employer to show that cause for termination actually existed where the employer had a good faith belief that

cause existed and then terminated the employee to further important public policy goals). Nonetheless, we conclude that, even assuming the Arizona Supreme Court would hold that an employer must show it had actual cause to terminate an employee, summary judgment was appropriate in this case on the issue of cause.

Summary judgment is properly granted where the moving party shows through the pleadings, depositions, affidavits, or other evidence that there is no genuine issue of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Once the moving party does so, the burden shifts to the opposing party to establish that a genuine issue as to a material fact actually does exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In attempting to establish a factual dispute, the opposing party must come forward with evidence of specific facts showing that the dispute exists; it cannot simply rely upon the denials of its pleadings. *Id.*; Fed. R. Civ. P. 56(e).

Ashway has failed to offer affirmative evidence that a genuine issue of *material* fact exists on the question of cause for termination. Ashway simply points to inconsistencies between Tye's description of certain events and her co-workers' testimony. For instance, Tye testified that Ashway used to bang loudly on her door and yell obscenities that her co-workers probably would have heard. Tye also stated the company installed a lock on her door at her request to keep Ashway out. The fact that other employees' testimony may have contradicted Tye's statements on these collateral issues, however, does not raise an issue of material fact as to whether or not any sexual harassment actually occurred.

Moreover, although Ashway could have submitted an affidavit averring that he never sexually harassed Tye or engaged in any of the behavior she described, he failed to do so. Instead, Ashway chose to rely on negative evidence – specificially [sic], on the fact that no other employee saw Ashway harassing Tye in the manner she described. However, Tye maintained all along that Ashway sexually harassed her only when they were alone, and that no one else witnessed Ashway's behavior. Thus, the fact that no other employee saw any sexual harassment neither undermines the company's determination that the harassment in fact occurred, nor casts doubt on Tye's credibility. Because Ashway has failed to tender evidence of specific facts showing that any material issues remain in dispute, we conclude summary judgment was properly granted.

AFFIRMED.

Ashway v. Ferrellgas, Inc., No. 90-15008

NOONAN, Circuit Judge, dissenting:

I dissent. Curtis S. Ashway is entitled to his day before a jury. His evidence raises serious doubts as to the adequacy of the investigation made by the company and even more serious doubts as to the existence of any cause for discharging him. He may well have been fired because of the fantasies of a coworker and the company's anxiety to do the politically correct thing. The material facts he puts at issue should properly have been determined by a jury.

EXHIBIT A-2

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS S. ASHWAY, Plaintiff-Appellant, vs. FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V, Defendant-Appellee.	No. 90-15008 D.C. No. CV-88-1806-PHX-CA ORDER (Filed Aug. 7, 1991)

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

Appellant's Petition for Rehearing With Suggestion For Rehearing En Banc is granted to the following extent:

> Section (IV) of the Memorandum filed May 9, 1991 is deleted. In its place, the following text is inserted:
>
> > Upon reconsideration of Ashway's contention that he was terminated without cause in violation of his employment agreement, we conclude that Ashway has raised a genuine issue of material fact as to the existence of cause. Accordingly, we reverse the district court's grant of summary judgement on this issue.
>
> AFFIRMED IN PART, REVERSED IN PART AND REMANDED.
>
> SO ORDER.

EXHIBIT A-3

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS S. ASHWAY, Plaintiff-Appellant, vs. FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V, Defendant-Appellee.	No. 90-15008 D.C. No. CV-88-1806-PHX-CA ORDER (Filed Sept. 12, 1991)

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

The order filed August 7, 1991, is amended as follows:

> At lines 3-4, the sentence that reads "Section (IV) of the Memorandum filed May 9, 1991 is deleted," should be changed to read, "Section (III) of the Memorandum filed May 14, 1991 is deleted."

SO ORDERED.

EXHIBIT A-4

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CURTIS S. ASHWAY, Plaintiff-Appellant, vs. FERRELLGAS, INC., a Delaware corporation authorized in Arizona; BUCKEYE GAS PRODUCTS COMPANY; JOHN DOES I through V, Defendant-Appellee.	No. 90-15008 D.C. No. CV-88-1806-PHX-CA ORDER (Filed March 2, 1991)

Before: PREGERSON, NOONAN, and THOMPSON, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested an en banc hearing. Federal Rule 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

BUCKEYE GAS PRODUCTS COMPANY

POLICY AND PROCEDURE MANUAL

NUMBER
B-14

PAGE
1 OF 2

DATE:
July 1, 1986

TITLE: EMPLOYEE TERMINATION

POLICY

14.101 It is the policy of Buckeye Gas Products to effect employment termination in a manner that ensures just and equitable treatment for the employee and the Company.

RESPONSIBILITY

14.201 It is the responsibility of the Vice President-Administration to ensure compliance to this policy and to ensure that this policy is kept current at all times.

PROCEDURE

14.301 Voluntary Termination

1. An employee who voluntarily leaves the employment of Buckeye Gas Products Company is expected to give two weeks notice to his or her supervisor.

2. An Employee Master must be completed the day the employee gives notice. It is important

that the Employee Master be sent to Personnel-Tulsa through proper organizational channels as soon as possible.

3. If the employee is terminating immediately, the Director-Personnel must be contacted and provided with all information pertinent to the termination. In order to process the employee's final check, this information must include vacation taken and overtime worked since the last Time Report and mileage log data, if applicable. Personnel will contact the Payroll Department so that necessary steps can be taken to process the final paycheck for the proper amount.

4. The Termination Report (Form 03-PIR-1068, Exhibit "A") must be completed for each terminating employee on or before his or her final day of work. The Report is a useful checklist for ensuring that Company assets are returned to the Company and it also serves as a record that all termination steps are complete. The Termination Report and the exit interview should be sent through proper channels to Personnel immediately upon completion.

5. The employee's final Time Report should be marked FINAL.

14.302 Involuntary Termination

1. Performance

   a. The decision to terminate an employee for poor work performance must be agreed upon by two levels of management. The Director-Personnel must be

informed of the decision before notice is given to the employee.

b. All information pertinent to the terminating employee must be communicated to the Director-Personnel as described in Section 14.301.3

c. The Employee Master, Termination Report, exit interview, and final Time Report must be completed and forwarded as explained in Section 14.301.

2. Discharge for Cause

a. If it is determined that an employee must be immediately discharged for cause, the employee's supervisor will discuss the situation with his or her manager and then terminate the employee or suspend the employee without pay pending investigation, whichever is applicable.

b. Subsequent to suspension or termination, the manager must call the Director-Personnel to discuss all facts pertinent to the situation to ensure Company compliance to all state and federal laws and regulations concerning terminations, and to avoid charges of wrongful discharge or EEOC discrimination on the part of Buckeye Gas Products Company.

c. When the employee is terminated, the Employee Master, Termination Report, and final Time Report must be completed and forwarded as explained above in Section 14.301.

3. Lack of Work

   a. An employee who is to be laid off for lack of work will be given two weeks notice when circumstances warrant. The decision to lay off an employee must be communicated to the Director-Personnel before notice is given to the employee.

   b. The Employee Master, Termination Report, exit interview, and final Time Report must be completed and forwarded as explained in Section 14.301.

4. The President's approval is required prior to termination of an employee with more than five years service. The Employee Master should not be signed until approval has been received from all levels up to the President.

14.303 Final Paycheck and Employee Benefits

1. Vacation pay earned and not taken will be paid to a terminating employee if the employee gives two weeks notice or if the termination is involuntary.

2. All vacation pay, overtime, or other pay due will be included in the employee's final paycheck and outstanding expense advances, uniform deductions, or other payments due to the Company will be deducted.

3. Information about the employee's investment plan, accrued retirement benefits, medical or life insurance conversion, or other benefits will be conveyed to the employee by the Benefits Department.

APPROVED BY: /s/ Illegible

SUPERSEDES: B-14 8/1/81